July 16, 2008

Mr. Dennis J. Barbour
153 Columbia Ave.
Rehoboth Beach, DE 19971

RE: Freedom of Information Act Complaint Against City of Rehoboth Beach

Dear Mr. Barbour:

On May 7, 2008, the Delaware Department of Justice ("DDOJ") received your complaint alleging that the City of Rehoboth Beach ("City") violated the Freedom of Information Act ("FOIA"), 29 *Del. C.* § 10001 *et seq.*, when the City's Boardwalk Committee held meetings between March 27 and April 2, 2008 that were 1) not publicly noticed, 2) were not open to the public, and 3) for which no minutes were made available.[1] On May 8, 2008, we sent your complaint to the City, and, pursuant to this office's grant of an extension of time in which to respond, we received its response on May 21, 2008. On May 28, 2008, you made a supplemental submission in reply to the City's response. On May 29, 2008, the City provided us, at our request, with the five Statements of Qualifications submitted in response to the City's Request for Qualifications ("RFQ") regarding its search for an engineering firm to provide professional services related to reconstruction of the Rehoboth Beach Boardwalk.[2] On

[1] The City has represented that minutes are being prepared. Therefore, we will not address the issue of failure to keep minutes.
[2] The City maintains that these five documents are confidential. We agree, for the reasons discussed below.

June 4, 2008, we received your reply to the material the City submitted on May 29, and we requested the City's response by June 25, 2008. The City provided the RFQ with that response.

As an initial matter, the City disputes that you have made a prima facie case that meetings occurred that were closed to the public. We have previously determined that in order to avoid placing on the public body the burden of proving a negative, the complainant "'must show substantive proof of a secret meeting rather than mere speculation in order to shift the burden of going forward.'" *Att'y Gen. Op.* 05-IB10, at 4 (Apr. 11, 2005), 2005 WL 1209240 (quoting *Gavin v. City of Cascade,* 500 N.W.2d 729, 732 (Iowa App. Ct. 1993)). Although your complaint did not substantiate your allegations of secret meetings, you did identify enough information to enable the City to determine that the Boardwalk Committee did meet between March 27, 2008 and April 2, 2008 without public notice. Because the City, properly, admitted the truth of your allegations, we will consider your complaint as if you had substantiated your allegations.

Statement of the Facts

According to the City, at public meetings in February, 2008, the Boardwalk Committee proposed, and the City Commissioners approved, obtaining the services of a professional engineering firm to produce plans and specifications for Phase I of the Boardwalk reconstruction project. In late February and early March, 2008, the City published an RFQ, which included the "Selection Procedure" –"[t]he City will select the firm they feel is most qualified to complete this project based on the written submissions and interviews." The Boardwalk Committee met without public notice in closed sessions on March 27, 31 and April 2, 2008 to rank and then interview individually the

engineering firms that responded to the RFQ. At the interviews, some of the engineering firms made PowerPoint presentations or distributed written material to supplement their Statements of Qualifications.

On April 11, 2008, the Boardwalk Committee held a public meeting at which, according to the agenda, it provided an "update" on the RFQ submissions and voted to recommend to the City Commissioners that they be permitted to contract with one of the submitters, Kercher Engineering, Inc. ("Kercher"). The City Commissioners voted at a public meeting on April 21, 2008 to authorize the Boardwalk Committee to enter into a contract with Kercher. It is undisputed that the Boardwalk Committee neither provided public notice of its intent to hold executive sessions for the purpose of interviewing the submitters and discussing the Statements of Qualifications, nor voted at a public meeting to go into executive session on March 27, 30 and April 2, 2008.

Relevant Statutes

29 *Del. C.* § 10002 (b) defines "[m]eeting" as a "gathering of a quorum of the members of any public body for the purpose of discussing or taking action on public business." "Every meeting of all public bodies shall be open to the public[.]" 29 *Del. C.* § 10004(a). As to executive sessions, which are closed to the public, 29 *Del. C.* § 10004(c) provides they may take place on the approval of a majority of the members at a meeting that is open to the public, "and the results of the vote shall be made public and shall be recorded in the minutes. The purpose of such executive sessions shall be set forth in the agenda and shall be limited to the purposes listed in subsection (b) of this section." Subsection (b)(6) provides that an executive session may be held for the purpose of discussing documents that are not public records pursuant to 29 *Del. C.* §

10002, where the discussion may reveal the contents of such documents. 29 *Del. C.* § 10002(g)(2) provides that "[t]rade secrets and commercial or financial information . . . which is of a privileged or confidential nature" are not public records.

29 *Del. C.* § 10004(e)(2) requires public bodies to provide the public seven days' notice of the time, place and agenda (if one has been determined) for their regularly scheduled meetings "and of their intent to hold an executive session closed to the public[.]"

Discussion

FOIA exempts from disclosure "trade secrets and commercial or financial information obtained from a person and privileged or confidential." 29 *Del. C.* § 10002(g)(2). The City contends the private meetings of the Boardwalk Committee were executive sessions pursuant to 29 *Del. C.* § 10004(c) and (b)(6) and § 10002(g)(2) because the purpose of the meetings was to discuss confidential commercial or financial information. The City provided to us for confidential review the Statements of Qualifications submitted by five engineering firms in response to the RFQ. First, from our review of these documents, we find that the Statements of Qualifications are commercial information obtained from a person. The question is whether they are "confidential." Because 29 *Del. C.* § 10002(g)(2) and the comparable provision of federal law, 5 U.S.C. § 552(b)(4), are identical, we can look to federal case law for guidance in interpreting Delaware's statute.

Commercial and financial records are confidential if "disclosure . . . is likely . . . (1) to impair the [public body's] ability to obtain necessary information in the future; or (2) to cause substantial harm to the competitive position of the person from whom the

information was obtained." *Nat'l Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974).[3] Applying this test to the Statements of Qualification submitted in response to the Boardwalk Committee's RFQ, we find that public discussion of these documents likely would either hamper the City's future ability to obtain this type of information or cause substantial harm to the submitters' competitive positions. The Statements of Qualifications contained such information as plans to analyze alternative materials, work schedules, engineering drawings, and schedules of rates—information that would likely be invaluable to a competitor who came later in the review of proposals. *See Shermco Indus., Inc. v. Sec'y of the Air Force*, 613 F.2d 1314 (5th Cir. 1980) (basic pricing information was confidential). Moreover, in the interviews, the engineering firms presented additional information that would have advantaged a competitor were the interviews open to the public; for example, one firm discussed a technical mapping process that was neither proposed nor discussed by any other firm. As the City explained, public meetings where competitive bids or proposals are presented or discussed would likely result in "unfair gamesmanship," preventing the public body from obtaining "the free and honest exchange of information critical to the integrity of the competitive process." Disclosure "would jeopardize the [public body's] ability to discern clearly which bidder could do the best job for the lowest price . . . [while] [n]ondisclosure . . . encourages competing bidders to enter bids which accurately reflect their capabilities and their costs; . . . Absent . . . confidentiality, bidders might be reluctant to disclose such information to the procuring government agency." *Id.* at 1317. This was not a process, as you have asserted, where sealed bids could not be supplemented once opened. The

[3] The *National Parks* test was approved by Congress, *CAN Fin. Corp. v. Donovan*, 830 F.2d 1132, 1152 n. 146 (D.C. Cir. 1987), and is followed by the United States District Court for the District of Delaware. *United Technologies Corp. v. Dep't of Health and Human Serv.,* 574 F.Supp. 86 (D. Del. 1983).

bidding process included interviews where bidders provided the Boardwalk Committee with valuable additional documentation concerning the proposals. Therefore, we find that the Boardwalk Committee's closed executive sessions were properly for the purpose of discussing confidential commercial documents.

However, the Boardwalk Committee did violate FOIA when it held executive sessions without notice to the public and when it failed to hold a public vote to go into executive session. You have asked the DDOJ to invalidate the Kercher contract if we find that the contract resulted from illegal meetings, but the DDOJ has no legal authority to issue such an order. While the Court of Chancery has the power pursuant to 29 *Del. C.* § 10005(a) to void any action taken in violation of FOIA, the DDOJ declines to pursue such an order in this case because, as the Kercher contract was the subject of two properly noticed public meetings—one of the Boardwalk Committee on April 11, 2008 and one of the City Commissioners on April 21, 2008—and the contract has been entered into and is being performed, it is unlikely that a court will impose the "very serious sanction" of voiding the actions of the Boardwalk Committee. *Wilmington Fed'n of Teachers v. Howell*, 374 A.2d 832, 835 (Del. 1977). Discussion of the submissions was appropriately done in executive session, and the votes to recommend and to authorize the Kercher contract occurred at the open meetings of April 11 and 21, 2008. Given those facts, it is unnecessary to require that the process be repeated to remedy the violations.

However, we cannot ignore that the Boardwalk Committee violated FOIA on three separate occasions. The public has a right to know when executive sessions are taking place, the purpose of the executive sessions and the outcome of the vote to go into executive session. In order to ensure that these violations are not repeated, we will

require that the Commissioners of the City of Rehoboth Beach enter into a consent agreement with the Attorney General, to require that the City provide notice of any and all Executive Sessions to the DDOJ at least three days prior to public notice of the Executive Session for a period of one year.

Conclusion

For the reasons stated herein, it is determined that purpose of the executive sessions of March 27 and 31 and April 2, 2008 was the discussion of confidential commercial records, which can properly be done outside of public view. However, the Boardwalk Committee of the City of Rehoboth Beach violated FOIA in holding those executive sessions 1) without giving the public seven days notice of its intent to hold executive sessions and 2) without voting at a public meeting to go into executive session. The attorney for the City will be contacted regarding the specific terms of the consent agreement.

Very truly yours,

Judy Oken Hodas
Deputy Attorney General

APPROVED

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Lawrence W. Lewis
State Solicitor

cc: Glenn C. Mandalas, Esquire

Sarah Murray, Opinion Coordinator